

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RICHARD AND HAZEL RUBIN	:	
	:	DETERMINATION
	:	DTA NO. 817675
for Redetermination of a Deficiency or for Refund of	:	
New York State and New York City Personal Income	:	
Taxes under Article 22 of the Tax Law and the New York	:	
City Administrative Code for the Years 1994, 1995 and	:	
1996.	:	

Petitioners, Richard and Hazel Rubin, 36 Mayfair Lane, Greenwich, Connecticut 06831, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1994, 1995 and 1996.

A hearing was commenced before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 641 Lexington Avenue, New York, New York, on May 1, 2002 at 10:30 A.M. and was continued to October 28 through 31, 2002, with all briefs to be submitted by May 5, 2003, which date began the six-month period for the issuance of this determination. Petitioners appeared by Eagle & Fein, Esqs. (Sidney Eagle, Esq., of counsel). The Division of Taxation appeared by Mark Volk, Esq. (Clifford M. Peterson and Kathleen D. O'Connell, Esqs., of counsel).

ISSUES

I. Whether petitioners were domiciliaries of New York City or New York State during the years 1994, 1995 and 1996 or maintained a permanent place of abode and spent more than 183

days in New York City or New York State during each year at issue and were, therefore, taxable as resident individuals.

II. Whether petitioner Hazel Rubin is entitled to relief as an innocent spouse thereby relieving her from liability for the tax deficiencies at issue herein.

III. Whether petitioner Hazel Rubin is entitled to relief from the joint and several liability provisions of Tax Law § 651(b)(2).

IV. Whether petitioners have met their burden to establish reasonable cause for abatement of penalties imposed upon the deficiencies.

FINDINGS OF FACT

1. This matter was initially assigned to the auditor on May 1, 1997 at which time she sent an appointment letter and a request for records required to perform the audit to Richard and Hazel Rubin (“petitioners”). The appointment letter sent by the auditor requested that petitioners complete audit questionnaires and furnish the Division of Taxation (“Division”) with the following records for the years 1994 and 1995: copies of Federal, New York State and other states’ tax returns with all attached schedules and statements (including forms 1099 and W-2); copies of closing statements of sale and the purchase or lease of all properties; moving bills; diaries for the audit period; schedules of nonworking days; schedules of days worked outside New York State and New York City and substantiation of days worked outside (employer expense reports, American Express statements and charge slips and hotel receipts). The audit was subsequently expanded to include the year 1996 as well.

Since the auditor was aware of several New York addresses for petitioners, she sent the letter to One Barken¹ Lane, Scarsdale, New York 10583 and 920 Park Avenue, Apartment 17D, New York, New York 10028. On June 3, 1997, the auditor received back the letter which she had sent to the Scarsdale address with the notification that the forwarding order had expired. On June 16, 1997, an investigator employed by the Division went to the Park Avenue apartment building and spoke with the doorman who stated that during the entire time of his employment (approximately four years), petitioners had resided in apartment 17D. On July 7, 1997 and again on July 31, 1997, the auditor mailed appointment letters to the Park Avenue address. She subsequently received certified mail receipts which indicated that the appointment letters had been received. On July 17, the auditor received a telephone call from Sidney Eagle, Esq., who indicated that he would be representing petitioners. After several postponements, the auditor received from petitioners' representative a power of attorney, copies of Federal, New York State and Connecticut tax returns for 1994 and 1995 and the audit questionnaire from Richard Rubin which indicated that petitioners' address was One Barker Lane, Scarsdale, New York until June 15, 1994 and 130 Butternut Hollow Road, Greenwich, Connecticut from June 15, 1994 until the present.

On February 27, 1998, the auditor received from petitioners' representative, a lease for the property at 130 Butternut Hollow Road and a closing statement for the purchase of property located at 36 Mayfair Lane, Greenwich, Connecticut. In April 1998, when the auditor asked Mr. Eagle for additional documentation, he replied that no additional documentation would be forthcoming.

¹ The audit report and the auditor's testimony indicated that the address was "Barken" Lane when, in fact, the actual address was "Barker" Lane.

On their returns for the years at issue, petitioners, having filed as nonresidents, included only their New York source income. More particularly, petitioner Richard Rubin included his salary from his employer, Donnkenny, Inc. (“Donnkenny”) as taxable income and excluded income derived from his investments.

2. As a result of having been informed that no additional documentation would be provided, a Statement of Personal Income Tax Audit Changes was issued to petitioners on April 9, 1998 which asserted additional personal income tax due of \$839,830.06 (\$497,845.38 in State tax and \$341,984.68 in New York City tax), plus penalty and interest, for a total amount due of \$1,228,141.15 for 1994, additional personal income tax due of \$1,123,540.22 (\$651,917.25 in State tax and \$471,622.97 in New York City tax), plus penalty and interest, for a total amount due of \$1,475,518.82 for the year 1995 and additional personal income tax due of \$377,254.11 (\$221,505.95 in State tax and \$155,748.16 in New York City tax), plus penalty and interest, for a total amount due of \$445,580.72 for the year 1996.

Along with the Statement of Personal Income Tax Audit Changes, the auditor included a letter which advised that petitioners were being held as New York State domiciliaries for 1994 and for 1995 until May 1, 1995 based upon their maintenance of a permanent place of abode in Scarsdale, New York, their presence in the State for more than 30 days during the year, their extensive business ties with New York State and their failure to comply with requests for information relating to residency and allocation of income. The letter further advised that petitioners were being held as statutory residents of New York State and New York City for 1994 and 1995 based on their maintenance of a permanent place of abode at 920 Park Avenue, Apartment 17D, New York, New York, their extensive business ties in the State and City, their presence in the State and City for more than 183 days during the year as well as their failure to

prove that they were not statutory residents for the year. Petitioners were not held to be New York City domiciliaries until June 15, 1994 because they owned a home in Scarsdale, New York.

3. On January 19, 1999, the Division issued a Notice of Deficiency to petitioners asserting the following tax deficiencies:

NYS or NYC	Tax Period	Tax	Interest	Penalty	Total
NYS	12-31-94	497,845.38	168,453.12	114,574.76	780,873.26
NYC	12-31-94	341,984.68	115,715.42	78,704.77	536,404.87
NYS	12-31-95	651,917.25	152,563.39	108,877.55	913,358.19
NYC	12-31-95	471,622.97	110,370.45	78,766.37	660,759.79
NYS	12-31-96	221,505.95	31,349.83	26,750.21	279,605.99
NYC	12-31-96	155,748.16	22,043.10	18,808.95	196,600.21
TOTALS		2,340,624.39	600,495.31	426,482.61	3,367,602.31

4. Petitioner Hazel Rubin, prior to her marriage to Richard Rubin in 1968, was raised in an apartment in the Bronx, New York. After their marriage, petitioners initially lived in an apartment in Yonkers, New York and later moved to a house at Palmer Avenue in Scarsdale, New York.

Petitioner Hazel Rubin worked as a teacher in the New York City public school system until 1972 at which time she started an interior decorating business known as Hazel Rubin Interiors or H. Rubin Interiors. The business ceased operation before 1992 so that Hazel Rubin could be at home with her children; the business started up again in 1999 or 2000. Although primarily inactive during the years at issue, the listed address of the business was 920 Park Avenue, New York, New York. Before ceasing operation in 1992, most of the business's clients

were located in Westchester County, New York; after it began operating again in 1999 or 2000, it also had New York City clients.

In 1975, petitioners and their daughter, Stephanie (born in 1972), moved to a four-bedroom, two-bathroom house located at One Barker Lane, Scarsdale, New York where they resided until 1994. At the time of their move to Scarsdale, Hazel Rubin's parents lived in the same apartment building in Yonkers as petitioners had previously resided (Hazel Rubin's mother died in 1975 and her father died in 1995). The only remaining sibling of either of Hazel Rubin's parents is an aunt who lives in Fort Lee, New Jersey.

In 1976, petitioners' second daughter, Allison, was born. During the years in which they lived in Scarsdale, petitioner Richard Rubin commuted daily to New York City where he was employed by Donnkenny, an apparel company. Richard Rubin later became a divisional head and thereafter became the president and chief executive officer of Donnkenny. Petitioner Richard Rubin's father worked for Donnkenny for approximately 10 to 12 years. The record does not disclose the location of his residence during the years at issue.

5. In 1993, with Stephanie in college in Gettysburg, Pennsylvania and Allison soon to graduate from high school, petitioners decided to move from Scarsdale, New York. They wanted to move to Greenwich, Connecticut where there were more social activities for adults without children. Greenwich is a 10-12 minute drive from Scarsdale on the parkway.

In December 1993, petitioners entered into a contract to purchase a house at 35 Fox Run Lane, Greenwich, Connecticut. However, the transaction was never completed because an architect informed petitioners that too much money would have to be spent on the house to make the renovations which petitioners desired. As a result, petitioners continued to look for another house in Greenwich.

In March 1994, they entered into a contract to purchase a house at 558 Lake Avenue, Greenwich, Connecticut. This purchase was not consummated because the sellers changed the terms of the contract. In the meantime, petitioners contracted to sell their Scarsdale house which sale was completed on July 13, 1994. Because they had not yet found a house to purchase in Greenwich, petitioners contracted for a summer rental at 130 Butternut Hollow Road, Greenwich, Connecticut for the period June 24 through September 5, 1994. The house at Butternut Hollow Road was furnished. When they vacated their Scarsdale home, petitioners put most of their furniture and personal belongings in storage. They utilized MZ Movers Systems, Inc. of White Plains, New York to move and store most of their furniture, clothing and personal belongings. During the summer of 1994, petitioners continued to look for a house in Greenwich; they thought they had found a suitable house on Clapboard Ridge Road, but the deal fell through when the sellers divorced.

6. Since Richard Rubin, who was now CEO of Donnkenny, was sometimes required to stay overnight in New York City to attend sales meetings and because petitioners deemed it a good investment, petitioners, in October 1991, entered into a lease for an apartment (5B) located at 920 Park Avenue in New York City. The apartment had two bedrooms, two and one-half bathrooms, a living room, dining room and kitchen. Petitioners also anticipated that the apartment would eventually be used as a residence by one of their daughters. As of October 2002, Allison Rubin was residing in apartment 5B and was paying the rent for such apartment. Stephanie Rubin also lived in apartment 5B during parts of 1994 and 1995.

Subsequent to leasing apartment 5B, petitioners, in March 1992, entered into a lease for apartment 17D in the same building (920 Park Avenue). Apartment 17D was a somewhat larger apartment with a better view. The lease for apartment 17D was in the name of petitioners'

daughter, Stephanie Rubin, with petitioner Richard Rubin as guarantor. This was done because of a rule which prohibited any tenant from leasing more than one apartment in the building. As of October 2002, Stephanie Rubin and her husband were temporarily residing in apartment 17D while their own apartment was being renovated.

After vacating their Scarsdale home in July 1994, petitioners did not wish to move to one of their New York City apartments because there was not enough room and because Hazel Rubin did not like living in New York City.

7. Since they had been unable to purchase a house in Greenwich, Connecticut as of the date on which they were forced to vacate their summer rental on Butternut Hollow Road in Greenwich, i.e., September 5, 1994, petitioners moved into apartment 17D at 920 Park Avenue in New York City. Petitioner Hazel Rubin always considered this to be a temporary residence and she continued to look for a house in Greenwich, Connecticut. From storage, petitioners removed only some furniture and seasonal clothing; the rest remained in storage.

In October or November 1994, petitioners found a house in Greenwich which they sought to purchase, but it was tied up in estate litigation and, accordingly, this deal also fell through. In December 1994, petitioners found a house at 36 Mayfair Lane in Greenwich which they desired to purchase, but as a result of tedious negotiations, the purchase was not completed until May 1, 1995. While invoices from MZ Movers Systems, Inc. indicate that deliveries from its storage facilities to 36 Mayfair Lane began in May 1995, petitioner Hazel Rubin admitted that petitioners did not move into the house until June 1995. The Mayfair Lane house, purchased from Thomas J. and Susan C. Hilfiger for \$5,500,000.00, is located on approximately seven acres of land and has six bedrooms, living room, dining room, kitchen, breakfast room, library as well as a pool house and a separate cottage.

8. When petitioners vacated the summer rental in September 1994, they changed their address on bank and brokerage statements to their 920 Park Avenue address because that was the only address which would not require petitioners to continually make changes. During the years at issue (1994 through 1996), petitioners had New York State driver's licenses and had vehicles which were registered in New York State. During the audit period, petitioners maintained bank accounts in a Greenwich, Connecticut bank and also had accounts which used the 920 Park Avenue, New York City address. Neither petitioner obtained a Connecticut driver's license until on or after August 1998. Petitioners had a family pet which was groomed once per month in New York City and petitioner Hazel Rubin did considerable shopping in New York City during the audit period.

While petitioners lived in Scarsdale, New York, they belonged to the Westchester Reformed Temple. Petitioners continue to maintain that membership.

Since moving to Greenwich, Connecticut, petitioner Hazel Rubin became a member of the United Jewish Appeal, the Round Hill Association (a neighborhood association), the Mayfair Lane Society (also a neighborhood association) and the Greenwich Historical Society. Petitioners have a number of friends in Greenwich and celebrate holidays at their Mayfair Lane home with family and friends.

9. Petitioner Richard Rubin along with his accountant (Sidney Eagle) prepared petitioners' income tax returns during the period at issue. Petitioners filed joint New York State nonresident or part-year resident returns throughout the audit period. On their 1994 New York State return, petitioners indicated that they moved out of New York State on June 15, 1994. For 1994, petitioners filed a Connecticut Nonresident or Part-Year Resident Income Tax Return on which they indicated that they had moved to Connecticut on June 16, 1994. Petitioners filed

Connecticut resident income tax returns for 1995 and 1996. Petitioners paid their 1995 Connecticut income tax liability with a check drawn on the Bank of New York. Petitioner Richard Rubin's name was imprinted on the check and his address as set forth on this check was 920 Park Avenue, New York, New York.

On the NYC-203, City of New York Nonresident Earnings Tax Return attached to petitioners' 1994 and 1995 forms IT-203, New York State Nonresident and Part-Year Resident Return, an "X" was placed in the box marked "No" in response to the question, "Did you or your spouse maintain an apartment or other living quarters in the city of New York during any part of the year?"

The 1994 Wage and Tax Statement (form W-2) issued by Donnkenny to petitioner Richard Rubin listed his address as One Barker Lane, Scarsdale, New York; the 1995 and 1996 W-2s are addressed to Richard Rubin at 36 Mayfair Lane, Greenwich, Connecticut. Petitioner Hazel Rubin signed the tax returns but she never reviewed the information contained thereon. Richard Rubin paid all of the bills and handled all financial matters.

During the years at issue, Hazel Rubin was a stay-at-home mom who was involved in the activities of petitioners' daughters and, after the purchase of the Mayfair Lane house in Greenwich, also spent a considerable amount of time renovating and furnishing the house.

10. At the hearing held herein, petitioner Hazel Rubin submitted schedules of days in and out of New York State and New York City for the years 1994, 1995 and 1996 and also testified regarding her whereabouts on specific days. The schedules were prepared from her recollections as well as from the pattern of the family's lives during these years. During the audit period, this petitioner kept no diaries or appointment books to verify the exact dates set forth in her schedules. The schedule for 1996 contains some substantiation of her whereabouts in the form

of credit card statements and a Canyon Ranch guest ledger which also lists the dates of her visits in 1994 and 1995. At the hearing, it was stipulated by petitioners and the Division that Hazel Rubin was present in New York City on 116 days during 1994,² 144 days in 1995³ and 83 days in 1996.⁴

Petitioners also stipulated that Hazel Rubin was physically present in New York State, but not New York City on 62 days in 1994. The Division stipulated that Hazel Rubin was outside New York State and New York City on 2 days in 1994, on 25 days in 1995 and on 7 days in 1996.

11. On the initial day of hearing in this matter, May 1, 2002, petitioners submitted schedules (Division's Exhibit "T") purporting to show the whereabouts of petitioner Hazel Rubin for the years 1994, 1995 and 1996. Attached to the schedules were some credit card receipts for 1995 and 1996. Since this was the first time that such schedules had ever been provided, the Division's auditor was asked by the administrative law judge to review the documentation prior to the date on which the hearing was to be resumed, i.e., October 28, 2002. Pursuant to the schedule produced on May 1, 2002, petitioner Hazel Rubin contended that she

² While the Division's brief, in Appendix II, Table 2, states that the parties stipulated that Hazel Rubin was present in New York City for 2 days during December 1994, both petitioner's brief and the hearing transcript (p. 351) properly reflect that Hazel Rubin stipulated that she was present in New York City from December 1 through and including December 23, 1994, a total of 23 days. Accordingly, the parties stipulated that such petitioner was present in New York City for 116 days during the year 1994.

³ The Division's brief, in Appendix II, Table 5, contains errors, i.e., the total stipulated days for which Hazel Rubin was present in New York City during 1995 should be 144, rather than 142. The actual total for April should be 21 days and for November should be 4 days, thereby increasing the total to 144 days.

⁴ The Division's brief, in Appendix II, Table 6, indicates that the total number of stipulated days for which Hazel Rubin was present in New York City in 1996 was 39. In fact, the record reveals that this petitioner conceded that she was present in New York City for 83 days and in New York State on an additional 19 days.

was outside New York City on 251 days during 1994 and was outside New York State on 187 days during that year.⁵

For 1994, the parties stipulated that Hazel Rubin was physically present in New York City on the following days:

January: 3rd, 4th, 14th, 17th, 18th, 26th and 27th (7 days)

February: 1st, 7th, 16th, 17th, 23rd and 24th (6 days)

March: 7th, 8th, 14th, 21st, 22nd, 28th and 29th (7 days)

April: 11th, 12th, 18th, 19th, 25th and 26th (6 days)

May: 3rd, 4th, 9th, 10th, 16th, 17th, 23rd through 25th (9 days)

June: None

July: 28th and 29th (2 days)

August: None

September: 7th through 12th, 19th through 25th (13 days)

October: 1st through 5th, 10th through 23rd and 31st (20 days)

November: 1st through 6th, 14th through 30th (23 days)

December: 1st through 23rd (23 days)

TOTAL: 116 days

On October 30, 2002, the fourth day of the hearing held in this matter, petitioners submitted revised schedules again purporting to show the whereabouts of petitioner Hazel Rubin for each of the years at issue. According to the revised schedule, Hazel Rubin was outside New

⁵ It must be noted that two different schedules were submitted for the month of February 1994, one indicated that Hazel Rubin was outside New York City for 26 days and outside New York State for 14 days during the month; the second schedule asserted that she was outside New York City for 22 days and outside New York State for 12 days that month.

York City on 248 days and outside New York State on 174 days during 1994. There were a number of discrepancies between the original schedule produced on May 1, 2002 and the revised schedule introduced on October 30, 2002. For example, for the month of January 1994, the original schedule states that Hazel Rubin was in Palm Beach, Florida from January 24th through 30th; the revised schedule lists no trip to Palm Beach during that month. Petitioner Hazel Rubin produced a copy of a guest history ledger from Canyon Ranch Management, LLC which indicates that she arrived at Canyon Ranch, Massachusetts on January 10, 1994 and stayed for three nights. Since she was residing in New York State (Scarsdale) at that time, the Division stipulated that she was physically present at the Canyon Ranch on January 11 and 12, 1994.

For the month of February 1994, the original schedule⁶ indicates that Hazel Rubin was in Palm Beach, Florida from February 17th through 23rd; the revised schedule does not allege that a trip to Florida was made during the month. The original schedule provides that from February 8th through 28th, no days were spent in New York City; the revised schedule indicates that four days during this period were spent in New York City in addition to the days spent in New York State, in Scarsdale, in lieu of the trip to Palm Beach, Florida.

For the year 1994, petitioners did not sell their Scarsdale, New York home until July 13, 1994. However, they did rent a house in Greenwich, Connecticut for the summer, beginning on June 24th and continuing until September 5th. While petitioner Hazel Rubin testified that the family moved into the summer home at Butternut Hollow Road in Greenwich during the first week of June, the lease provided that the term did not begin until June 24, 1994. The schedules submitted by petitioner for 1994 assert that she was in Greenwich, Connecticut from June 6th

⁶ The original schedule provided to the auditor on May 1, 2002 which contains two different pages purporting to set forth Hazel Rubin's whereabouts for the month of February 1994 contains information which is different from that which was set forth on the revised schedule subsequently produced on October 30, 2002.

through June 30th (with the exception of June 24th). Accordingly, absent independent evidence to substantiate and explain where petitioners resided in Greenwich during the period June 6th through June 23rd inclusive, i.e., a period of 18 days, these days must be found to be New York State days since petitioners did not sell their Scarsdale home until July 13, 1994. Therefore, since it has been stipulated that Hazel Rubin was physically present in New York State for 178 days (116 days in New York City and 62 days in New York State), it is heretofore determined that this petitioner was physically present in the State for no less than 196 days during 1994.

Petitioner Hazel Rubin stated that in New York City, she took an art class, went to museum lectures, shopped, attended the theater and met friends for lunch or dinner. Petitioners' daughter, Stephanie Rubin Wagner, indicated that her mother usually came into New York City once or twice per week to go to a museum class or for decorating purposes. Yet, according to the schedules provided to the auditor on May 1, 2002 and on October 30, 2002, except for two days in July (the 28th and 29th), Hazel Rubin spent no time in New York City from May 26, 1994 through September 7, 1994 when petitioners moved into their apartment at 920 Park Avenue in New York City.

12. As noted in Finding of Fact "11", petitioners provided a schedule of the purported whereabouts of petitioner Hazel Rubin for the year 1995 to the Division's auditor on May 1, 2002; unlike 1994, however, the schedule introduced into evidence at the hearing on October 30, 2002 was identical to the one initially provided to the auditor.

For 1995, the parties stipulated that Hazel Rubin was physically present in New York City on the following days:

January: 1st through 31st (31 days)

February: 1st through 20th and 26th through 28th (23 days)

March: 7th through 12th and 17th through 23rd (13 days)

April: 3rd through 7th and 15th through 30th (21 days)

May: 1st through 14th and 21st through 31st (25 days)

June: None

July: 30th and 31st (2 days)

August: None

September: 14th and 15th (2 days)

October: 1st through 5th, 9th, 10th, 16th, 17th, 20th through 24th, 30th and 31st (16 days)

November: 6th, 7th, 20th and 23rd (4 days)

December: 4th, 5th, 11th, 12th, 18th, 19th and 22nd (7 days)

TOTAL: 144 days

It was also stipulated that petitioner was in Europe for the period July 11th through July 28th, a period of 18 days, and that she was in Florida from December 24th through December 30th, a period of 7 days.

Petitioner's schedule indicates that she traveled to London, England for the period May 15, 1995 through May 20, 1995 for the purpose of visiting her daughter Stephanie who was living there from August 1994 through June 1995 while in a graduate study program with Sotheby's. As substantiation, petitioner provided an invoice from Besselink & Jones (May 16, 1995) and an invoice from Stephanie Hoppen Ltd (May 19, 1995). Accordingly, based on petitioner Hazel Rubin's credible testimony and the invoices from these London businesses, it is hereby found that petitioner was in London during the period May 15, 1995 through May 20, 1995 and was, therefore, not physically present in New York State or New York City during these six days.

Petitioners also provided a travel itinerary from Reliable Travel for “Mr. & Mrs. Richard Rubin & Family” which indicated that petitioners departed from JFK Airport and flew to Milan, Italy on July 10, 1995, flew from Venice, Italy to Nice, France on July 21, 1995 where they stayed for two days and then traveled to St. Tropez, France where they stayed until July 19, 1995 whereupon they flew from Nice to JFK Airport on July 29, 1995. The Division stipulated that petitioners were outside New York State and New York City from July 11 through July 28, 1995. Based upon the fact that they were already living in their Greenwich, Connecticut home as of the date of departure, it is hereby found that the date of departure (July 10, 1995) and the date of return (July 29, 1995) shall also be considered to be non-New York City and New York State days as well.

Petitioners furnished a Four Seasons account statement which indicates various charges made from December 23 through December 31, 1995. The Division stipulated that petitioners were outside New York State and New York City from December 24 through December 30. For the same reasons as provided above relative to petitioners’ European trip, it is hereby determined that December 23 and December 31, 1995 shall also be considered as non-New York City and New York State days as well.

13. For the year 1996, petitioner Hazel Rubin provided a substantial number of credit card statements in an attempt to substantiate her whereabouts during the year. The Division would not concede days spent outside the City and State supported by charges made in Connecticut or Massachusetts because of the geographical proximity of these states to New York State and New York City and because Greenwich, Connecticut is within commuting distance to New York City. It must be noted that a restaurant where petitioners admittedly dined frequently, the Rye Grill which is located in Rye, New York is within blocks from Greenwich, Connecticut (tr. p.520).

As previously noted (*see*, Finding of Fact “5”), Greenwich is a 10 -12 minute drive from petitioners’ previous home in Scarsdale, New York. Therefore, the only days for which the Division would agree to stipulate that Hazel Rubin was outside the City and State during 1996 were: January 27 through January 29 (California); February 10, 1996 (Los Angeles) and May 2 through May 4 (Massachusetts).

The parties stipulated that Hazel Rubin was physically present in New York City on the following days in 1996:

January: 14th and 19th (2 days)

February: 1st, 3rd, 6th, 11th, 12th, 21st and 22nd (7 days)

March: 12th through 14th, 22nd and 30th (5 days)

April: 4th, 11th, 14th, 15th, 17th, 20th, 23rd, 28th through 30th (10 days)

May: 13th through 17th, 30th and 31st (7 days)

June: 8th, 12th, 17th and 18th (4 days)

July: 6th, 10th, 11th, 19th, 22nd, 24th, 25th, 29th and 31st (9 days)

August: 8th, 9th, 12th, 13th, 15th, 22nd, 23rd and 29th (8 days)

September: 11th, 17th, 19th and 25th (4 days)

October: 3rd, 4th, 7th through 9th, 21st, 23rd, 25th, 29th and 30th (10 days)

November: 3rd through 7th, 10th, 12th, 14th, 17th through 19th, 21st, 22nd and 26th (14 days)

December: 3rd, 5th and 7th (3 days)

TOTAL: 83 days

As previously indicated, unlike for the years 1994 and 1995, petitioner Hazel Rubin, did produce numerous credit card statements and invoices for 1996 and, in addition, offered testimony relating to some of the charges incurred. The original schedule of Hazel Rubin’s days

in and out of New York for 1996 which was provided to the auditor on May 1, 2002 asserts that she was in Greenwich, Connecticut on 154 days; the revised schedule submitted into evidence on October 30, 2002 lists 194 days as having been spent in Greenwich. An example of the disparity in days allotted to Greenwich between the two schedules is the month of December. On the first schedule (Exhibit "T"), no days are designated as having been spent in Greenwich. Petitioner lists two trips to Palm Beach, Florida totaling 14 days and these are the only days for which the schedule asserts that petitioner was outside New York. On the second schedule (Exhibit "13"), 15 days are listed as having been spent in Greenwich with a total of 26 days having been spent outside New York. It must be noted that while some of the credit card statements list activities for Hazel Rubin, the credit card statements are in the name of petitioner Richard Rubin and, in addition, there are various account numbers for which statements were produced. During the audit period, petitioner Richard Rubin had American Express credit cards bearing three different account numbers and an Optima Card. The Division would not stipulate to any days for which there existed a charge to an account maintained by petitioner Richard Rubin due to the fact that: (a) Mrs. Rubin testified that when making purchases on a credit card, she used her own card which was in her name, and (b) Mr. Rubin admitted that a variety of people, including family members and employees, used his credit cards. However, since Hazel Rubin did offer testimony to support a number of these credit card charges, they must be examined in some detail.

14. Petitioner Hazel Rubin admitted that there were days when she left her home in Greenwich, Connecticut and traveled to New York City or to other areas of New York State which were close in proximity to Greenwich (tr. p. 275). While she also stated (tr. p. 275) that, to the best of her ability, she listed those days in her schedule of days in and out of New York (Exhibit "13"), prior to an oral stipulation made at the hearing by petitioners' representatives,

there were no days set forth on that schedule where it was indicated that Mrs. Rubin was in New York. Moreover, petitioner's ability to recall her whereabouts clearly must be called into question by virtue of the fact that there are a number of discrepancies between the original schedule of days in and out of New York for all of the years at issue which was produced and offered for the first time to the auditor on the first day of hearing in this matter May 1, 2002 (Exhibit "T") and a subsequent schedule which was produced for the first time on October 29, 2002 at a continuation of the hearing held in this matter (Exhibit "13"). As an example, for January 1996, the initial schedule indicated that Hazel Rubin was in Greenwich, Connecticut from January 1st through January 8th and from January 11th through January 17th. The schedule produced on October 29, 2002 states that this petitioner was in Greenwich from January 1st through January 13th and January 15th through January 19th.

For the month of January, the parties stipulated at the hearing that Mrs. Rubin was in New York City on January 14th and January 19th. The parties further stipulated that petitioner was outside the State and City on the dates of January 27th through January 29th when she was in California. Petitioner produced a guest history ledger from Canyon Ranch Management, LLC which indicates that she arrived at Canyon Ranch, Arizona on January 21, 1996 and stayed for five nights, i.e., she departed on January 26, 1996. An American Express ("AMEX") charge receipt on the account of petitioner Richard Rubin indicates that petitioners arrived at the Hotel Bel Aire in Los Angeles on January 26 and departed on January 30th. Since it was stipulated that petitioner was then in California from January 27th through January 29th, it will be presumed that she went directly from Arizona to California. Therefore, for the month of January 1996, it is hereby determined that petitioner Hazel Rubin was outside the State and City of New York from

January 21 through 30, 1996, a total of 10 days and was in New York City (and New York State) on 2 days, January 14th and January 19th (per the stipulation).

For February 1996, despite the fact that both schedules submitted by petitioner, i.e., the ones provided to the auditor on May 1, 2002 and the one introduced into evidence on October 29, 2002, contain information to the contrary, it was stipulated by the parties that Hazel Rubin was present in New York City on the following days: February 1st, 3rd, 6th, 11th, 12th, 21st and 22nd and was present in New York State on February 13th. The parties stipulated that she was in New Orleans, Louisiana on February 10th. An AMEX charge slip on the account of Richard Rubin indicates that petitioners arrived at the Windsor Court Hotel in New Orleans, Louisiana on February 9th and departed on February 11th; the credible testimony of Hazel Rubin established that she accompanied her husband on the trip to visit their daughter Allison who was a student at Tulane University. Therefore, February 9th and 10th are hereby determined to have been days spent outside New York. While the original schedule of days in and out of New York indicates that Hazel Rubin was in London from February 26 to 29, 1996, the subsequent schedule lists those days as having been spent in Greenwich. Based upon the evidence produced herein and the stipulations entered into between the parties, it is determined that petitioner Hazel Rubin spent 2 days outside the State and City of New York and spent 7 days in New York City and 1 day in New York State during February 1996.

For March 1996, the parties stipulated that petitioner Hazel Rubin spent the following days in New York City: March 12th through 14th, March 16th, 18th, 22nd and March 30th (the original schedule of days in and out of the State and City indicated that petitioner was in Greenwich on March 12th, 14th, 16th, and 18th). The first schedule indicates that Hazel Rubin was in London from March 1st through 3rd while the second schedule lists those days as having been spent in

Greenwich. Accordingly, it is hereby determined that petitioner Hazel Rubin spent 7 days in New York City in March 1996.

For April 1996, the parties stipulated that petitioner Hazel Rubin spent the following days in New York City: April 4th, April 11th, April 14th, April 15th, April 17th, April 20th, April 23rd and April 28th through 30th, a total of 10 days. On April 10th, there was a charge incurred for food and beverage at 146 N & R Corp. in New York City. Absent an explanation for this charge, April 10th is also determined to have been a day spent in New York City. A Bloomingdale's in New York City charge incurred on April 19th results in that day being deemed a New York City day as well. Accordingly, petitioner Hazel Rubin is determined to have spent 12 days in the State and City during the month of April 1996.

For May 1996, it was stipulated that petitioner Hazel Rubin spent the following days in New York City: May 13th through 17th and May 30th, a total of 6 days and it was also stipulated that she spent May 31st in New York State. A guest history ledger from Canyon Ranch Management, LLC indicates that she arrived in Canyon Ranch, Lenox, Massachusetts on May 1, 1996 and stayed for 4 nights, or until May 5th. Accordingly, these 5 days are determined to be days spent outside the State and City. On May 6th, petitioner admits to visiting her aunt in Fort Lee, New Jersey but also admits that she went through New York City to do so. Therefore, May 6th is also determined to have been a day spent in New York City. Charge receipts in New York City incurred on May 10th, May 11th, May 20th (there is also a charge receipt for a florist in Greenwich on this date), May 22nd (there is a charge for furnishings and accessories and for food and beverage in Greenwich on this date), May 24th, May 28th and May 29th result in these days being found to be days spent in New York City as well. Accordingly, petitioner Hazel Rubin is

deemed to have spent 14 days in New York City, 1 day in New York State and 5 days outside the State and City during the month of May 1996.

For the month of June 1996, the original schedule of days in and out of New York State and New York City which was presented to the auditor on May 1, 2002 indicated that Hazel Rubin was in Greenwich from June 1st through June 17th. Later, however, at the hearing held on October 29, 2002, petitioners stipulated that June 7th was a day spent in New York State and the days of June 8th, 12th and 17th (the 17th was also listed as a day spent in Greenwich on the second schedule as well) were spent in New York City. In addition, petitioners also stipulated that the days of June 18th, June 19th and June 20th were spent in New York City. On the first schedule, it was contended that Hazel Rubin was in Switzerland and Italy from June 18th through June 30th. The second schedule indicates that she was in Europe from June 21st through June 30th. There are credit card charges to an AMEX account of Richard Rubin in Switzerland on June 23rd, June 24th, June 26th, June 27th and June 29th as well as charges incurred in Italy into the early part of July 1996. Accordingly, the period June 23rd through June 30th (a total of 8 days) shall be deemed to have been spent outside the State and City of New York.

For July 1996, the parties stipulated, at the hearing held on October 29, 2002, that petitioner Hazel Rubin was present in New York City on the days of July 6th, 10th, 11th, 19th, 22nd, 24th, 25th, 29th and 31st, a total of 9 days and that she was present in New York State on July 5th and 15th. Since petitioners produced a credit card statement which included charges incurred in Italy through July 4th, the period July 1st through 4th shall be considered to be days spent outside the State and City of New York. The first schedule produced by petitioners on May 1, 2002 indicates that Hazel Rubin spent the period July 6th through 31st in Greenwich. The second schedule introduced in evidence on October 29, 2002 lists gaps in petitioner's stay in Greenwich

which, at the hearing, were later stipulated to have been spent in either New York City or New York State. It must also be noted that there are a number of credit card charges to various accounts belonging to Richard Rubin on days during the month on which it is contended that Hazel Rubin was in Greenwich.

As was the case for other months, the schedules produced by petitioners on May 1, 2002 and October 29, 2002 have a number of differences for the month of August 1996. While neither schedule indicates that any days were spent in New York, petitioners stipulated at the hearing on October 29, 2002 that the following days were spent in New York City: August 8th, 9th, 12th, 13th, 15th, 22nd, 23rd and 29th (a total of 8 days) and that the following days were spent in New York State: August 4th, 5th, 21st and 24th (a total of 4 days). It is contended by petitioner that she spent August 18th in Fort Lee, New Jersey but, as was the case previously, she went through New York City during her travels to and from New Jersey. Therefore, that day will also be considered to have been a day spent in New York City. A credit card statement indicates that petitioner spent the night of August 19th in Canyon Ranch Resort in Lenox, Massachusetts so that day will be deemed to have been spent outside New York. While petitioner Hazel Rubin contends that she went to New Orleans on August 30th and 31st (the first schedule indicates that she was New Orleans on August 29th as well), there is no substantiation therefor.

For September 1996, there are again a number of differences between the schedules submitted on May 1, 2002 and October 29, 2002. For example, on the first schedule, it was alleged that Hazel Rubin was in Los Angeles from September 9th through 12th while the second schedule makes no reference to a trip to California during this month. At the hearing held on October 29, 2002, petitioners stipulated that the following days were spent in New York City: September 11th, 17th, 19th and 25th (a total of 4 days) while the following days were spent in New

York State: September 5th, 13th and 29th (a total of 3 days). A Canyon Ranch Management, LLC guest history ledger indicates that petitioner arrived at Canyon Ranch in Lenox, Massachusetts on September 25th and stayed for 4 nights, departing on September 29th. Since petitioner stipulated that September 29th was a day spent in New York State, the period of September 25th through the 28th, a total of 4 days, shall be deemed to have been spent outside the State.

For October 1996, the initial schedule of days in and out of New York which was provided by petitioners to the auditor at the first day of hearing on May 1, 2002 indicated that petitioner Hazel Rubin was in London from October 7th through October 20th while the second schedule states that she was in London from October 11th through October 20th. A credit card statement indicates that petitioner (and her daughter Stephanie) departed from JFK Airport in New York on October 11th. A hotel charge was incurred at the Dorchester Hotel, Park Lane, London on October 20th.⁷ Accordingly, this 10-day period, October 11th through 20th shall be deemed to have been days spent outside the State and City of New York. At the hearing held on October 29, 2002, petitioners stipulated that the following days were spent in New York City: October 3rd, 4th, 7th through 9th, 21st, 23rd, 25th, 29th and 30th (a total of 10 days) and that the days of October 24th and October 27th were spent in New York State.

For the month of November 1996, the two schedules of days in and out of New York again differed substantially. For example, the first schedule presented to the auditor on May 1, 2002 indicated that Hazel Rubin was in London and Paris from November 13th through November 21st; no such trip is listed on the second schedule introduced into evidence at the hearing held on October 29, 2002. On this date, petitioners stipulated that the following days were spent in New

⁷ It must be noted that this same AMEX statement indicates that charges were incurred at Harry Cipriani of New York for food and beverages on certain dates (October 16th and 17th) during the period of the alleged trip to London.

York City: November 3rd through 7th, 10th, 12th, 14th, 17th through 19th, 21st, 22nd and 26th (a total of 14 days) and that she was present in New York State on November 11th and November 24th. Various credit card statements indicate that charges were incurred in Palm Beach, Florida on November 27th, 29th and 30th which, along with the credible testimony of petitioner Hazel Rubin, establish that she was in Palm Beach for the period of November 27th through 30th, a total of 4 additional days outside New York.

For December 1996, a credit card statement indicates that Hazel Rubin returned a rental car in Palm Beach, Florida on December 1st and that she departed from the Ocean Grand Hotel in Palm Beach on December 2nd. However, a charge for gourmet food at the Vinegar Factory in New York City precludes a finding that December 2nd was a day spent outside New York as well. Accordingly, December 1st is found to be a day spent outside the State and City of New York while December 2nd must be held to have been a day spent in New York City. Petitioners also stipulated that the days of December 3rd, 5th and 7th were spent in New York City. An AMEX statement indicates that Hazel Rubin departed from New York for West Palm Beach, Florida on December 21st and additional AMEX statements reflect charges in Florida from December 22nd through December 28th. Accordingly, this period, December 21st through 28th (a total of 8 days) shall be deemed to have been spent outside the State and City of New York.

15. At the first day of hearing, May 1, 2002, petitioner Richard Rubin provided to the auditor, schedules purporting to set forth his whereabouts during 1994, 1995 and 1996. For the years 1994 and 1995, the schedules contained no documentation to support the information contained in the schedules. When called to testify at the hearing on October 30, 2002, petitioner and his representatives indicated that no evidence would be offered to corroborate petitioner's

earlier allegations that he was not physically present in New York City (and New York State) on more than 183 days during each of the years 1994 and 1995.

On October 30, 2002, during his testimony, petitioner introduced a revised schedule for 1996 as well as some credit card statements and receipts to substantiate his whereabouts during the year. According to petitioner, the schedule was prepared from credit card statements, from a memo book which was kept in his office at Donnkenny and from conversations with his wife and children. The memo book related not just to Mr. Rubin's activities but also consisted of notes concerning the whereabouts of other Donnkenny employees. In the case of the dates of January 25 through January 28, 1996, the memo book contained some duplicate pages which, though in petitioner's handwriting, include different entries for the same date.

Before examining the supporting documentation, it must be noted that the initial schedule of days in and out of New York for 1996 provided as follows:

	Days Outside NYC	Days Outside NYS
January	16	16
February	12	12
March	10	10
April	16	16
May	16	16
June	20	20
July	18	18
August	17	17
September	14	14
October	22	22
November	22	22
December	29	29

TOTAL	212	212
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Pursuant to the revised schedule introduced on October 30, 2002, petitioner Richard Rubin was outside New York City⁸ as follows:

	Days Outside NYC
January	11
February	8
March	10
April	13
May	10
June	16
July	22
August	18
September	13
October	16
November	30
December	23
TOTAL	190

Not only did the total of the days spent outside New York City drop from 212 on the first schedule to 190 on the second schedule, but the monthly totals were, with the exception of the month of March, vastly different from the first schedule to the second.

At the hearing, it was stipulated or conceded that Richard Rubin was physically present in New York City on 165 days during 1996. The Division stipulated that Mr. Rubin was outside

⁸ The revised schedule set forth monthly totals for days spent outside New York City only.

New York City on 33 days during 1996. The days for which it was stipulated that Richard Rubin was physically present in New York City were as follows:

January: 2nd through 5th, 8th through 12th, 14th through 20th and 22nd through 25th (20 days)

February: 1st, 2nd, 4th through 8th, 14th through 16th, 20th through 23rd, 25th through 29th (19 days)

March: 1st, 4th through 8th, 11th through 31st (27 days)

April: 1st through 5th, 8th, 9th, 22nd through 26th, 29th and 30th (14 days)

May: 6th through 10th, 12th through 17th, 20th through 24th, 28th (17 days)

June: 3rd through 7th, 10th through 14th and 17th through 19th (13 days)

July: 8th through 10th, 15th, 18th, 29th and 30th (7 days)

August: 1st, 2nd, 5th through 8th, 13th, 15th, 16th, 22nd, 23rd, 26th and 27th (13 days)

September: 4th through 6th, 9th through 13th, 16th through 20th, 24th, 25th and 30th (16 days)

October: 1st through 4th, 21st through 25th, 28th, 29th (11 days)

November: None

December: 2nd through 4th, 12th, 16th through 19th (8 days)

TOTAL: 165 days

The days for which the Division stipulated that petitioner Richard Rubin was outside New York were as follows:

January: 27th through 30th [California] (4 days)

February: 10th and 11th [Los Angeles] (2 days)

March: None

April: 11th [Wisconsin] (1 day)

May: 4th [Massachusetts], 27th [Connecticut] (2 days)

June: 23rd through 30th [Europe] (8days)

July: 1st through 4th [Europe], 7th [Connecticut] (5 days)

August: None

September: 28th [Massachusetts] (1 day)

October: None

November: 29th and 30th [Florida] (2 days)

December: 22nd through 29th [Florida] (8 days)

TOTAL: 33 days

On 77 days on which Richard Rubin maintains that he was not present in New York City during 1996, his credit card statements show charges in New York City on those days; on 11 of these dates, the statements indicate charges incurred outside New York State as well. On 12 additional days on which he claimed to be outside New York City and New York State, the statements show charges in the State. For example, on January 6, 1996, petitioner's schedule indicates that he was not in New York City; however, an American Express statement contains a charge for a New York City restaurant on that date. Petitioner admitted, however, that other family members and, in some cases, other Donnkenny employees used his credit card at certain establishments. As to the credit card charges, Mr. Rubin explained that in the case of hotel charges, there are often "after charges" which appear as charges on dates after the date of checkout. In addition, he noted that in the case of charges for airline tickets, such charges often appear on the day on which the ticket is charged to the credit card rather than on the date of actual departure. Because he almost always commuted to work from his home (in 1996, his home was in Greenwich, Connecticut), Mr. Rubin conceded that there were many days on which he was present within and without New York City and New York State.

While Mr. Rubin had a general recollection of his activities during the year, he was not able to recall the specific dates on which such activities occurred. Richard Rubin suffers from Alzheimer's disease and admitted that he is sometimes unable to remember things as a result of the disease.

16. It must be noted that during his direct testimony, Mr. Rubin stated (and his schedule reflected) that he was in Greenwich, Connecticut and, therefore, outside New York on March 16th and 17th, 23rd and 24th and 30th and 31st, yet it was previously stipulated at the hearing that he was physically present in New York City on each of those days.

In addition, petitioner admitted that he was in New York City on April 6th, 7th and 27th as well as on those days previously stipulated to. The total New York City days for April 1996 is, therefore, 17 rather than 14 days.

For May 1996, petitioner also admitted that he was in New York City on May 18th and 19th and May 30th and was in New York State (at the Rye Grill in Rye, New York) on May 29th. Total New York City days for May 1996 are, therefore, 20 rather than 17 days with one additional day in New York State as well.

For July and August 1996, petitioner admitted that he was present in New York State (in Larchmont, New York) on July 31st and on August 4th (Rye Grill).

For September 1996, petitioner admitted that he was in New York City on September 21st (total days for September are, therefore, 17 rather than 16 as previously stipulated to) and that he was in New York State on September 1st (Tarrytown) and September 29th (Larchmont). Petitioner also conceded that he was in New York City on October 26th (total days for October are, therefore, 12).

For November 1996, petitioner admitted that he was in New York City for dinner on November 4th and that he was in New York State (in Rye, New York) on November 24th.

As a result of the additional admissions by petitioner Richard Rubin, total New York City days for 1996 are 174 and total New York State days are 180.

17. As a part of the stipulation between the parties (*see*, Finding of Fact “15”), the Division conceded that Richard Rubin was in Los Angeles, California from January 27th through January 30th, a total of 4 days. There is no evidence to substantiate petitioner’s contention that he was in Los Angeles on January 26th and 31st as well.

For February 1996, petitioner contends that he was in New Orleans from February 9th through February 13th. Since there is an AMEX statement which shows charges in New Orleans on February 9th and 10th, these days shall be considered to have been days spent outside the State and City of New York. Because petitioner Hazel Rubin testified that she traveled with her husband and since she stipulated that she was in New York City on February 11th, only the 9th and 10th shall be held to have been days spent outside New York.

For March 1996, petitioner contends that each and every Saturday and Sunday during the month were spent in Greenwich. Yet, there are charges to New York City establishments which appear on petitioner’s AMEX statement. While some of the charges were incurred at Cipriani’s Restaurant where it was explained that employees of Donnkenny and petitioners’ daughters dined and charged the cost to Richard Rubin’s AMEX account, there were other New York City charges as well. For example, on Saturday, March 9th, there was a charge to the restaurant at the Regency Hotel in New York City and on Saturday, March 23rd and Sunday, March 24th, there are charges to other New York City businesses as well.

For April 1996, a charge to the Pfister Hotel on April 11th substantiated petitioner's presence in Milwaukee as contended. GTE Airfone charges from Oak Brook, Illinois confirm his presence out of New York on April 15th. Petitioner contends that he traveled to Illinois, Wisconsin and Virginia from April 10th through April 19th; however, since receipts confirm his presence only on April 11th and 15th, it is hereby determined that the period April 11th through April 15th (a total of 5 days) was spent outside New York during the month.

For May 1996, petitioner contends that he was at the Canyon Ranch Resort in Lenox, Massachusetts from May 1st through May 5th. In support thereof is an AMEX statement which indicates that purchases were made on March 4th and 5th in and around the Lenox area. However, since petitioner Hazel Rubin testified that she and Mr. Rubin were at the Canyon Ranch from May 1st through May 5th and since it has heretofore been determined that Mrs. Rubin was outside New York for that period (*see*, Finding of Fact "14"), it is hereby found that petitioner Richard Rubin was outside New York for this 5-day period as well.

For June 1996, petitioner asserts that he was in Europe from June 20th through June 30th. As was the case for petitioner Hazel Rubin (*see*, Finding of Fact "14"), the period June 23rd through June 30th (a total of 8 days) shall be deemed to have been spent outside New York since charges incurred in Switzerland and Italy appear on petitioner's AMEX account from June 23rd into the early part of the month of July.

For July 1996, petitioner's contention that he spent the period of July 1st through July 4th in Europe is substantiated by credit card charges in Italy during this period. Petitioner's contention that he was in Los Angeles on July 16th and 17th is unsubstantiated.

For August 1996, an AMEX statement indicates that petitioner arrived at the Las Vegas Hilton Hotel on August 28th and departed on August 29th. Therefore, these 2 days shall be

considered to have been spent outside New York. All other travel allegedly made outside New York during the month was unsubstantiated.

For September 1996, petitioner contends that he spent the period September 26th through September 29th at Canyon Ranch in Lenox, Massachusetts. A Canyon Ranch Management, LLC guest history ledger indicates that Hazel Rubin (there is no indication that Richard Rubin was also a guest at the same time) was a guest at the resort (*see*, Finding of Fact “14”). The charge on the guest history ledger for Mrs. Rubin is \$2,108.51. A charge to petitioner Richard Rubin’s for lodging at the Canyon Ranch Resort on September 29, 1996 appears in the amount of \$2,584.72. In addition, there was a charge for antiques/collections at the Country Dining Room in Great Barrington, Massachusetts on September 28, 1996. Based upon the charges to Richard Rubin’s account, it cannot be found that he, too, was a guest at the Canyon Ranch Resort during that period. It must also be noted that Mrs. Rubin stipulated that September 29th was spent in New York City.

For October 1996, petitioner’s schedule of days in and out of New York indicates that he was in London during the period October 7th through October 20th. Charges at the Dorchester Hotel, Park Lane, London appear on petitioner’s AMEX account for this period. In addition, a charge appears on petitioner’s September AMEX statement which indicates that he purchased a ticket on Virgin Atlantic Airways for a departure from London to New York on October 20th (tickets for Hazel and Stephanie Rubin were also purchased at the same time; however, their departure date was October 11th). Accordingly, the period October 7th through October 20th, a period of 14 days are found to have been spent outside New York.

In November 1996, petitioner contends that he was in Palm Beach, Florida from November 28th through November 30th. Since the only substantiation is credit card charges in

Florida on November 29th and 30th, these two days only shall be held to have been spent outside New York.

For December 1996, petitioner contends that he was in Europe from December 7th through December 11th and that he was in Florida from December 22nd through December 30th. Charges incurred in France appear on petitioner's AMEX statement for the days of December 7th and 9th. Accordingly, the period December 7th through December 9th (a total of 3 days) shall be deemed to have been spent outside New York. The AMEX statement further reflects that petitioner departed from New York for West Palm Beach, Florida on December 21st and returned to New York on December 30th. Therefore, this period of 10 days shall also be found to have been spent outside New York.

Accordingly, it is hereby determined that when adding the additional days heretofore found to have been spent outside New York to the days previously stipulated to by the Division (33 days), the total days for which it has been substantiated that petitioner Richard Rubin was outside the State and City of New York for 1996 was 63 days.

18. In December 1996, petitioner Richard Rubin was forced to resign from his position as President, Chief Executive Officer and Chairman of the Board of Donkenny. In 1999, he pled guilty to securities fraud relating to his actions between 1994 and 1996 wherein he directed employees at Donnkenny to make up invoices for sales transactions which never occurred, told employees at Donnkenny to use journal vouchers to record sales which he knew had never taken place and knowingly signed an annual report containing inaccurate sales figures. When the charges against Mr. Rubin and the subsequent investigation became public, the value of Donkenny stock declined. It was determined that investors lost approximately \$49,000,000.00, the sum of which Mr. Rubin was ordered to pay as restitution.

Because of the circumstances of his separation from Donnkenny, Mr. Rubin stated that he was unable to obtain receipts to substantiate his business travel which was billed to and paid by Donnkenny. However, petitioner did not subpoena these records from Donnkenny. When he pled guilty to securities fraud, he was required to turn over his passport to the Federal government which lost the passport. As a result, Mr. Rubin was unable to offer it to substantiate his foreign travel during the audit period.

19. In February 2000, petitioners filed an amended New York State nonresident return for 1996 on which additional income was reported. Accordingly, the Division is asserting that this additional income is also subject to New York State and New York City income tax since it is the Division's position that petitioners are taxable as residents of the State and City.

On October 27, 2002, the Division issued a revised Statement of Personal Income Tax Audit Changes to reflect the additional income reported by petitioners on their amended return. This Statement of Personal Income Tax Audit Changes asserted additional tax liability of \$383,805.75 (\$226,029.65 in New York State tax and \$157,776.10 in New York City tax), plus penalty and interest, for a total amount due of \$544,295.07 for 1996. This reflects an increase in combined State and City tax liability of \$6,551.64, plus applicable penalty and interest for the year based upon this additional income.

CONCLUSIONS OF LAW

A. Tax Law § 605(b)(1) sets forth the definition of a New York State resident individual for income tax purposes as follows:

Resident individual. A resident individual means an individual:

(A) who is domiciled in this state, unless (1) he maintains no permanent place of abode in this state, maintains a permanent place of abode elsewhere, and spends in the aggregate not more than thirty days of the taxable year in this state . . . , or

(B) who is not domiciled in this state but maintains a permanent place of abode in this state and spends in the aggregate more than one hundred eighty-three days of the taxable year in this state, unless such individual is in active service in the armed forces of the United States.

The definition of a New York City “resident” is identical to the State resident definition, except for the substitution of the term “city” for “state.” (*see*, Administrative Code § 11-1705[b][1][A], [B]; *see also* 20 NYCRR 295.3[a]; 20 NYCRR Appendix 20, § 1-2[c]). The classification of resident versus nonresident is significant, since nonresidents are taxed only on their New York State or City source income, whereas residents are taxed on their income from all sources.

B. In this matter, the Division’s position is that petitioners were domiciliaries of the State of New York, i.e., Scarsdale, New York, until July 13, 1994. After selling their Scarsdale home on that date, petitioners first moved into a house which they rented for the summer of 1994 in Greenwich, Connecticut and, upon vacating the summer rental on September 5, 1994, moved into their New York City apartment until June 1995 when they moved into their house at 36 Mayfair Lane in Greenwich, Connecticut. Therefore, the Division maintains, petitioners continued to be New York State domiciliaries since they failed to abandon their New York domicile. Petitioners’ frequent and consistent activities in New York City, their business ties to the City and their continued use of their New York City apartment address throughout and beyond the audit period are evidence, contends the Division, that petitioners were domiciled in Scarsdale, New York until July 1994 when they became domiciliaries of New York City.

C. 20 NYCRR 105.20(d) provides, in relevant part, as follows:

Domicile. (1) Domicile, in general, is the place which an individual intends to be such individual’s permanent home - the place to which such individual intends to return whenever such individual may be absent.

(2) A domicile once established continues until the individual in question moves to a new location with the bona fide intention of making such individual's fixed and permanent home there. *No change of domicile results from a removal to a new location if the intention is to remain there only for a limited time; this rule applies even though the individual may have sold or disposed of such individual's former home.* The burden is upon any person asserting a change of domicile to show that the necessary intention existed. In determining an individual's intention in this regard, such individual's declarations will be given due weight, but they will not be conclusive if they are contradicted by such individual's conduct. The fact that a person registers and votes in one place is important but not necessarily conclusive, especially if the facts indicate that such individual did this merely to escape taxation.

* * *

(4) *A person can have only one domicile. If a person has two or more homes, such person's domicile is the one which such person regards and uses as such person's permanent home.* In determining such person's intentions in this matter, the length of time customarily spent at each location is important but not necessarily conclusive. It should be noted however, as provided by paragraph (2) of subdivision (a) of this section, a person who maintains a permanent place of abode for substantially all of the taxable year in New York State and spends more than 183 days of the taxable year in New York State is taxable as a resident even though such person may be domiciled elsewhere. (Emphasis added.)

D. In the present matter, it is clear that petitioners were New York State domiciliaries for a number of years prior to the years at issue herein, having owned and lived in their house at One Barker Lane in Scarsdale, New York. On July 13, 1994, petitioners sold their Scarsdale house. While it is true that their intent may well have been to make their new permanent home in Greenwich, Connecticut (this intent is evidenced by having entered into a contract to purchase a house in Greenwich at 35 Fox Run Lane in December 1993 as well as having agreed to purchase other homes in Greenwich which, for a variety of reasons, were not completed), no permanent home was established in Greenwich until June 1995 when they moved into the house at 36 Mayfair Lane. Clearly, the summer rental at 130 Butternut Hollow Road in Greenwich was for a limited duration (June 24 through September 5, 1994) and was not, therefore, a fixed and

permanent home. When petitioners were unable to complete a purchase of a home in Greenwich by the time they had to vacate this summer rental, they were forced, on September 5, 1994, to move into one of their two apartments, i.e., apartment 17D, at 920 Park Avenue in New York City where they continued to reside until June 1995 when they moved into their new home at 36 Mayfair Lane in Greenwich.

The credible testimony of petitioner Hazel Rubin establishes that it was never the intent of petitioners to make New York City their permanent home. While they had owned the two Park Avenue apartments for some time, they never intended to reside in these apartments on a permanent basis. However, as noted in 20 NYCRR 105.20(d)(2), “[a] domicile once established continues until an individual moves to a new location with the bona fide intention of making such individual’s fixed and permanent home there.” To effect a change in domicile, there must be an actual change in residence, coupled with an intent to abandon the former domicile and to acquire another (*Matter of Minsky v. Tully*, 78 AD2d 955, 433 NYS2d 276). Since the move to the New York City apartment was made on a temporary basis while the search for a permanent home in Greenwich, Connecticut continued, it cannot be found that petitioners ever became domiciliaries of New York City. However, it is clear that they continued to be domiciliaries of New York State while residing at 920 Park Avenue since no domicile outside New York State was established until they moved to 36 Mayfair Lane in Greenwich in June 1995. Accordingly, it is hereby found that for the year 1994, petitioners were New York State domiciliaries for the entire year and were properly taxed, by the Division, as residents for the year.

E. While it is unclear from the record as to the exact date in June 1995 on which petitioners moved into their house at 36 Mayfair Lane in Greenwich, based upon the schedules of days in and out of New York produced by petitioner Hazel Rubin, it shall be presumed, for

purposes of this proceeding, that the move occurred on June 1, 1995. It is necessary, therefore, to determine whether, as of June 1, 1995, petitioners changed their domicile from the State of New York to the State of Connecticut.

The test of intent with respect to a purported new domicile has been stated as “whether the place of habitation is the permanent home of a person, with the range of sentiment, feeling and permanent association with it” (*Matter of Bodfish v. Gallman*, 50 AD2d 457, 378 NYS2d 138, 140, *citing Matter of Bourne*, 181 Misc 238, 246, 41 NYS2d 336, 343 *affd* 267 App Div 876, 47 NYS2d 134).

While the standard is subjective, the courts and the Tax Appeals Tribunal have consistently looked to certain objective criteria to determine whether a taxpayer’s general habits of living demonstrate a change of domicile. Among the factors that have been considered are: (1) the retention of a permanent place of abode in New York (*see, e.g., Matter of Gray v. Tax Appeals Tribunal*, 235 AD2d 641, 651 NYS2d 740, *confirming Matter of Gray*, Tax Appeals Tribunal, May 25, 1995; *Matter of Silverman*, Tax Appeals Tribunal, June 8, 1989); (2) continued business activity in New York (*Matter of Erdman*, Tax Appeals Tribunal, April 6, 1995; *Matter of Angelico*, Tax Appeals Tribunal, March 31, 1994); (3) family ties in New York (*Matter of Gray, supra*; *Matter of Buzzard*, Tax Appeals Tribunal, February 18, 1993, *confirmed* 205 AD2d 852, 613 NYS2d 294); (4) continuing social and community ties in New York (*Matter of Getz*, Tax Appeals Tribunal, June 10, 1993); and (5) formal declarations of domicile (*Matter of Gray, supra*; *Matter of Getz, supra*).

While it is true that petitioners retained permanent places of abode in New York (the two apartments at 920 Park Avenue), these apartments were purchased by petitioners in 1991 and 1992 for the convenience of petitioner Richard Rubin when it was necessary to stay in New York

City for business reasons. In addition, the apartments were also purchased for investment purposes and also for the potential inhabitancy by petitioners' daughters.

It is undisputed that petitioners, after moving to Greenwich, Connecticut in June 1995, continued business activities in New York City. Until his resignation from Donnkenny in December 1996, petitioner Richard Rubin continued to commute, on an almost daily basis, from his Greenwich home to his New York City office. While petitioner Hazel Rubin ceased to operate her interior decorating business in or about 1992 in order to spend more time with her children, the business was resumed after the audit period and continued to use the 920 Park Avenue address. The fact that both petitioners continued business activities in New York cannot, however, be found to be an indication that they continued to be New York domiciliaries. The proximity of Greenwich, Connecticut to New York allowed petitioners to change their lifestyle without severing their ties to New York. It seems obvious, considering the title and compensation associated with Richard Rubin's position at Donnkenny, that any move out of the State of New York would have to have been to a location within commuting distance to New York City. Therefore, continued business ties to New York cannot be found to be a factor in determining whether petitioners effected a change of domicile.

Neither can family ties in New York be considered as a determinative factor. During the years at issue, petitioners' daughters were in college and upon graduation or during vacations from school, they lived with petitioners at their Greenwich home just as they had when petitioners resided in Scarsdale. While the fathers of both petitioners apparently continued to live in the State of New York, there is no indication that petitioners, because of their proximity to New York, ever resided with their fathers or stayed with them during any visits.

Admittedly, petitioners continued some organizational and religious memberships and continued to socialize with friends who lived in the State or City of New York. Again, based upon their proximity to their former home in Scarsdale and to New York City, it is certainly reasonable for petitioners to have continued their social and organizational ties after moving to Greenwich.

A taxpayer may change his or her domicile without severing all ties with New York State (*see, e.g., Matter of Sutton*, Tax Appeals Tribunal, October 11, 1990).

In summary, based upon the credible testimony of petitioners relative to their intent in establishing a permanent home in Greenwich, Connecticut, the purchase price and size of the 36 Mayfair Lane house and the pattern of living and lifestyle of the family after moving into this house, it is hereby found that as of June 1, 1995, petitioners effected a change of domicile and became domiciliaries of Connecticut.

F. Even though petitioners, as of June 1, 1995, were no longer New York domiciliaries, the Division, for 1995 and 1996, could properly tax petitioners as residents of New York State (and New York City) if they maintained a permanent place of abode in the State (and City) and spent in the aggregate more than 183 days during 1995 and 1996 in the State (and City). It is undisputed that petitioners maintained a permanent place of abode in New York City during 1995 and 1996. In fact, petitioners maintained two permanent places of abode, i.e., their two apartments (5B and 17D) at 920 Park Avenue in New York City. Petitioner Hazel Rubin contends that she was not a statutory resident of New York City because she did not spend more than 183 days in the City in 1994, 1995 or 1996. She further contends that she was not a statutory resident of the State of New York in 1995 or 1996 because she did not spend more than 183 days in the State in 1995 or 1996. Petitioner Richard Rubin contends that he was not a

statutory resident of the State and City of New York in 1996 because he did not spend more than 183 days in the State or City in that year.

It must be noted that petitioner Richard Rubin offered no evidence as to his days in and out of the City and State of New York during 1994 and 1995. Since he has heretofore been found to have been a New York State domiciliary for 1994 and since he failed to offer any proof to sustain his burden of proving that he did not spend more than 183 days in New York City in 1994, it must be found that the Division properly taxed petitioner Richard Rubin as a resident of both the State and City of New York for 1994. With respect to 1995, because petitioner again failed to offer any proof to sustain his burden of proving that he did not spend more than 183 days in New York City in 1995, the Division properly taxed petitioner Richard Rubin as both a resident of the State and City of New York for 1995 as well.

Accordingly, it will be necessary to determine whether petitioner Hazel Rubin was a statutory resident of the City of New York for each of the years at issue (1994, 1995 and 1996) and, having already determined that she was a New York State domiciliary (and, therefore, properly taxable as a resident) for 1994⁹, whether this petitioner was a statutory resident of the State of New York for 1995 and 1996. As to petitioner Richard Rubin, it will be necessary to determine whether he was a statutory resident of the City or State of New York for 1996.

G. At the hearing, petitioner Hazel Rubin stated that the schedules of her days in and out of the State and City of New York for the years 1994 through 1996 were prepared from her recollections as well as from the pattern of the family's lives during this period. She admitted

⁹ It was also determined that even had she not been found to have been a New York State domiciliary for 1994, petitioner Hazel Rubin was physically present in the State for no less than 196 days during 1994 (*see*, Finding of Fact "11").

that she kept no diaries or appointment books to verify the exact dates as were set forth on these schedules.

In ***Matter of Avildsen*** (Tax Appeals Tribunal, May 19, 1994), a case where the Tribunal dealt with the issue of whether credible testimony of a taxpayer's witness, his personal secretary and executive assistant who made his travel reservations, provided him with a schedule of his personal appointments and dealt with both personal and business matters for the taxpayer, was sufficient as a matter of law to establish that a taxpayer did not spend more than 183 days in New York City during particular tax years, the Tribunal stated as follows:

To prove that a taxpayer was not present in New York or New York City for more than 183 days through only testimony is a very significant task because the witness will have to convince the Administrative Law Judge that the witness was in a position to know the taxpayer's whereabouts on every day of a specific year or years, that the witness can accurately remember such details and, as well, that the witness is truthfully recounting these details.

* * *

If [the witness's] testimony had simply been a general statement that petitioner was not present in New York for more than 183 days each year and was based simply on her recollection of events occurring five years ago, *rather than on records she had made of these events*, it is doubtful that the Administrative Law judge would have found the testimony credible.

In ***Matter of Kern*** (Tax Appeals Tribunal, November 9, 1995, ***confirmed Matter of Kern v. Tax Appeals Tribunal***, 240 AD2d 969, 659 NYS2d 120), the Tribunal stated:

Where a taxpayer can establish a 'pattern of conduct' from which his location may be determined for any particular day, the taxpayer need not specifically account for his whereabouts on every day of the subject period. However, where a taxpayer cannot establish a pattern of conduct that covers a large period of time, then more specific evidence relating to daily activity is required.

In the present matter, petitioner Hazel Rubin prepared schedules of her whereabouts during 1994, 1995 and 1996 from her personal recollections. Moreover, these schedules were prepared in 2002. When, during the audit, the auditor requested that records substantiating petitioner's whereabouts be provided, none were forthcoming until May 1, 2002, the first day of the hearing held in this matter when a schedule purporting to show her whereabouts on each and every day during 1994, 1995 and 1996 was produced and provided to the auditor. Of even greater significance is the fact that on the fourth day of the hearing, October 30, 2002, petitioner submitted revised schedules again purporting to show this petitioner's whereabouts during the audit period. As noted in Finding of Fact "11", there were discrepancies between the two schedules. Other than a copy of a guest history ledger from Canyon Ranch Management, LLC which confirms that petitioner arrived at Canyon Ranch in Lenox, Massachusetts on January 10, 1994 and stayed for three nights, the schedules for 1994 contain no evidence to substantiate this petitioner's whereabouts for any other days in 1994. Accordingly, absent records kept contemporaneously or other evidence to corroborate the contents of the schedules, it must be found that petitioner Hazel Rubin has failed to sustain her burden of proving that she was not physically present in New York City for more than 183 days during 1994 and, as a result thereof, the Division properly held her to be a statutory resident.

H. For the year 1995, petitioner stipulated that she was physically present in New York City on 144 days during the year (*see*, Finding of Fact "12"). The Division stipulated that petitioner Hazel Rubin was outside the State and City of New York on 25 days during the year (*see*, Finding of Fact "10"). In addition to the days for which the Division conceded that petitioner was outside New York (July 11th through 28th; December 24th through 30th), it was determined that petitioner was in London, England during a six-day period (May 15th through

20th), that two additional days must be added to her European trip in July, i.e., July 10th and 29th and that two additional days must also be added to her Florida trip in December, i.e., December 23rd and 31st. These additional days were considered to be days spent outside New York because during this period, petitioner was living in Greenwich, Connecticut and credibly testified that she entered New York solely for the purpose of leaving from and returning to a New York airport. Presence within New York may be disregarded if it was solely for the purpose of boarding a plane or certain other modes of transportation for travel to a destination outside the State (*see*, 20 NYCRR 105.20[c]). Accordingly, petitioner Hazel Rubin has substantiated that she was outside the State and City of New York on 29 days during 1995. A review of the schedule of petitioner's alleged days in and out of New York for 1995 reveals no discernible patterns. She contends that she traveled extensively: a trip to New Orleans in February; three separate trips to Europe in March; a trip to London and to Palm Beach, Florida in April, etc. Yet, petitioner admitted that she was not certain as to the exact dates of these trips and could offer no substantiation (other than for July and December trips referred to above) that the trips were made during the periods set forth in her schedules. Accordingly, it must be found that for 1995, petitioner Hazel Rubin has failed to sustain her burden of proving that she was not physically present in the State and City of New York on more than 183 days during the year and, as a result, the Division's taxation of this petitioner as a resident individual of the State and City for 1995 was proper.

I. For the year 1996, petitioner Hazel Rubin conceded that she was physically present in New York City on 83 days during 1996. The only days for which the Division would stipulate that petitioner was outside the State and City were January 27th through 29th (3 days in California), February 10th (1 day in Los Angeles) and May 2nd through 4th (3 days in

Massachusetts), for a total of 7 days. A review of the documentation produced by petitioner (*see*, Finding of Fact “14”) substantiates the following:

	Days in NYC	Days in NYS	Days Outside NYC & NYS
January	2		10
February	7	1	2
March	7		
April	12		
May	14	1	5
June	6	1	8
July	9	2	4
August	9	4	1
September	4	3	4
October	10	2	10
November	14	2	4
December	4		8
TOTAL	95	16	56

By virtue of the proof submitted by petitioner Hazel Rubin for the year 1996, it has been substantiated that she spent 95 days in New York City, 16 days in New York State and 56 days outside the State and City during the year. As to the remaining days of 1996, in some cases, petitioner has asserted that she traveled outside New York, but provided no substantiation therefor. For many other days, she contends that was in Greenwich (*see*, Finding of Fact “13”). However, despite the fact that some credit card charges were made in Greenwich on some of the days on which petitioner contended that she was in Greenwich, these charges alone do not constitute sufficient proof of her whereabouts. This is true for a number of reasons.

First, petitioner Hazel Rubin, as substantiation, has offered credit card statements showing charges to various establishments in Greenwich. These statements, however, are in the name of Richard Rubin who may have been the person who incurred the charges. Moreover, as previously noted (*see*, Finding of Fact “15”), other family members also used Mr. Rubin’s charge cards at certain business establishments. This casts serious doubt as to the reliability of these credit card statements in establishing the whereabouts of Hazel Rubin.

Second, as noted in Finding of Fact “15”, there were a considerable number of days during 1996 on which, despite Richard Rubin’s assertion that he was not present in New York City, there were charges incurred in New York City and outside the City on the same day. This certainly raises a question as to the reliability of these credit card statements.

Third, because of the proximity of Greenwich to New York City and certain portions of New York State, it was rather easy for petitioner to spend part of a day in Greenwich and part of the same day in the City or State. Petitioner admitted that there were days when she did just that (*see*, Finding of Fact “14”).

The most compelling reason, however, for a finding that Hazel Rubin has failed to sustain her burden of proving that she was in Greenwich, Connecticut (or in other locations outside the State and City of New York where no other substantiation exists) on the days on which her schedules have so indicated is the unreliability of the schedules themselves. Clearly, these schedules were prepared for purposes of the hearing held in this matter. This is corroborated by the fact that the schedules were never provided to the auditor for approximately five years, i.e., the time between the initial request for records in 1997 and the first date of this hearing, May 1, 2002. Moreover, at a continued date for this hearing, October 30, 2002, another schedule purporting to contain the day-by-day whereabouts of petitioner was introduced. For the year

1996, the revised schedule was substantially different from the schedule provided nearly six months earlier. While, for some months during 1996, there are differences in petitioner's alleged whereabouts between the two schedules (*see*, Finding of Fact "14"), the fact that the original schedule provided that petitioner spent 154 days in Greenwich while the revised schedule indicated that 194 days were spent in Greenwich is, in and of itself, enough to render the schedules wholly unreliable to prove petitioner's whereabouts. Accordingly, it is hereby determined that petitioner Hazel Rubin has failed to sustain her burden of proving that she did not spend more than 183 days in New York State and New York City in 1996 and, therefore, the Division's taxation of this petitioner as a resident individual was proper.

J. As previously noted (*see*, Finding of Fact "15"), petitioner Richard Rubin offered no evidence regarding the number of days which he spent in the State and City of New York during 1994 and 1995. As a result, based upon the fact that he maintained two permanent places of abode in New York City, i.e., apartments 5B and 17D at 920 Park Avenue, and his failure to prove that he did not spend more than 183 days in New York State and New York City in 1994 and 1995, he is hereby determined to have been a statutory resident of both the State and City for these years.

With respect to the year 1996, petitioner did offer evidence regarding his whereabouts. As was the case with his wife, petitioner Hazel Rubin, Richard Rubin produced a schedule of his whereabouts during each day of the year which he furnished to the auditor, for the first time, on May 1, 2002, the first day of the hearing held herein. Attached to the schedule were some credit card statements and receipts. Subsequently, on October 30, 2002, petitioner introduced a revised schedule which was substantially different from the initial schedule (*see*, Finding of Fact "15"). After reviewing all of the evidence submitted as well as the stipulations entered into between the

parties relative to petitioner's days spent in and out of the State and City, it was determined that petitioner has substantiated that he spent 63 days outside New York during 1996 (*see*, Finding of Fact "17") and that petitioner conceded that he spent 174 days in New York City and an additional 6 days in New York State, for a total of 180 days spent in the State of New York.

In order for it to be determined that petitioner was not a statutory resident of the State and City of New York for 1996, it would be necessary for him to prove that he spent an additional 121 days outside the State and City during the year. Petitioner has wholly failed to sustain this burden of proof. This is true for a number of reasons.

First, the schedules offered by petitioner were prepared by using documents which were unreliable. These documents included credit card statements, a memo book kept in his office at Donnkenny and consultations with his family. As previously noted, on certain dates, there were charges to Mr. Rubin's several credit cards made both in and out of New York on the same date. The credit card statements must be accorded a lesser weight since, admittedly, the credit cards were also used by Mr. Rubin's wife and daughters as well as by some of his Donnkenny employees. The memo book used to prepare the schedules was a book kept not just to record petitioner's activities, but the activities and whereabouts of certain other Donnkenny employees as well.

Second, petitioner Richard Rubin suffers from Alzheimer's disease, a disease which affects his memory. Admittedly, Mr. Rubin was unable to recall the specific dates on which activities occurred. Even had his power of recall not been impaired by Alzheimer's disease, by virtue of his plea of guilty to securities fraud in connection with his position at Donnkenny, petitioner's credibility must be seriously called into question. This is particularly true when the two schedules of his days in and out of New York for 1996 are examined. As previously

indicated, the disparity between the contents of the schedule provided to the auditor on May 1, 2002 and the subsequent schedule introduced into evidence on October 30, 2002 is remarkable (*see*, Finding of Fact “15”).

Petitioner has conceded that he spent 174 days in New York City and 180 days in New York State in 1996 and was able to substantiate that he spent only 63 days outside New York for the year. He, therefore, has failed to sustain his burden of proving that he spent more than 183 days outside the State and City in 1996; accordingly, the Division’s taxation of this petitioner as a resident individual for said year was proper.

K. Tax Law § 651(b) (former [5][A]), in effect during the years at issue, provided that if:

- (i) a joint return has been made under this subsection for a taxable year,
- (ii) on such return there is a substantial understatement of tax attributable to grossly erroneous items of one spouse,
- (iii) the other spouse establishes that in signing the return he or she did not know, and had no reason to know, that there was such substantial understatement, and
- (iv) taking into account all the facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such substantial understatement, then the other spouse shall be relieved of liability for tax (including interest, penalties and other amounts) for such taxable year to the extent that such liability is attributable to such substantial understatement.

For purposes of this statute, the term “grossly erroneous items” means:

any item of New York adjusted gross income attributable to such spouse which is omitted from New York adjusted gross income and any claim of a New York deduction, exemption, credit or basis by such spouse in an amount for which there is no basis in fact or law. (Tax Law § 651[b][former(5)(B)(i)]).

The term “substantial understatement” means any understatement which exceeds one hundred dollars (Tax Law § 651[b][former(5)(B)(ii)]).

Since petitioners filed joint returns for each of the years at issue, the first criterion for innocent spouse status has been satisfied. In addition, it is clear from the amount of the deficiencies at issue that there was a substantial understatement of tax for each of the years. However, the substantial understatement cannot be found to have been “attributable to grossly erroneous items of one spouse.” This is true for two distinct reasons.

First, as the Division, in its brief, correctly points out, the exclusion of petitioners’ investment income from the New York returns had a basis in law if they were, in fact, nonresidents. Second, even if it could reasonably be interpreted that the filings of the returns as nonresidents for each of the years at issue were “grossly erroneous items,” i.e., that there was no basis in fact or law for such filing status, such grossly erroneous items were not those of one spouse. While it may well have been the decision of petitioner Richard Rubin alone or in conjunction with his tax preparers to file these returns as nonresidents, the determination that it is legally proper to file as nonresidents, when filing a joint return, is not attributable to one spouse, but to both.

Petitioner Hazel Rubin admitted that while she signed each of the returns at issue, she did not review the information contained thereon. The handling of all financial matters, including the preparation of tax returns was left to and was the responsibility of petitioner Richard Rubin. While Mrs. Rubin’s admissions are credible, they do not provide an excuse.

In order to be accorded innocent spouse status, the statute provides that in signing the return, the other spouse (in this case, Hazel Rubin) “did not know, and had no reason to know, that there was such substantial understatement” (Tax Law § 651[b][former (5)(A)(iii)]). Clearly, Mrs. Rubin was an educated woman. She was a former schoolteacher and later operated an interior decorating business. Had this been a case where her spouse claimed an exemption or

deduction to which he was not entitled or had he concealed some income which Mrs. Rubin was unaware of, then perhaps it could be found that she “had no reason to know” of the resulting substantial understatement. The type of return which a taxpayer is filing is clearly denoted at the top of the return and as previously indicated, for each of the years at issue, the returns were labeled “Nonresident and Part-Year Resident” returns.

By virtue of the fact that it has heretofore been determined that the requirements of Tax Law § 651(b)(former [5][A][ii],[iii]) have not been met, it is hereby found that petitioner Hazel Rubin is not entitled to innocent spouse status.

L. During the years at issue, Tax Law § 651(b)(former [2]) provided that if the Federal income tax liabilities of a husband and wife are determined on a joint Federal income tax return, they must file a joint New York income tax return and their tax liabilities shall be joint and several.¹⁰

Chapter 567 of the Laws of 1998 repealed paragraph (5) of subsection (b) of Tax Law § 651 (the innocent spouse provisions) and added a new paragraph (5) which provided, in relevant part, as follows:

When spouses file a joint return for a taxable year, the liability for tax with respect to each spouse shall be determined as follows:

(A) By multiplying the total liability arising from the joint return by a fraction, the numerator of which is the tax for the taxable year at issue determined separately for the taxpayer, and the denominator of which is the sum of the taxes for such taxable year determined separately for the spouse and for the taxpayer.

¹⁰ The statute provides for some exceptions to this rule which are inapplicable to the present matter except for the innocent spouse provisions of Tax Law § 651(b)(former [5]) which have previously been addressed in Conclusion of Law “K”.

While this statute, in essence, provided for proportionate liability for each spouse rather than joint and several liability for the entire tax deficiency, clearly, this statute was not in effect during the years at issue in this matter. The new statute was effective only for taxable years beginning on and after January 1, 1999. While petitioners, in their brief, acknowledge that the law would not be applied retroactively, they maintain that it would be inequitable not to allow petitioner Hazel Rubin the benefit of this change in the law. Unlike the Division of Tax Appeals small claims proceedings where “a just and equitable determination” (Tax Law § 2012) is authorized, no such equity jurisdiction is granted in proceedings before an Administrative Law Judge (*see*, Tax Law § 2010). Therefore, the issue as to whether it would be equitable to allow petitioner Hazel Rubin the benefit of the change in the law in the present proceeding is beyond the jurisdiction of the Division of Tax Appeals. It should also be noted that the provision of the law which petitioner seeks to have applied to this proceeding, i.e., Tax Law § 651(b) (former [5]), was repealed by Chapter 407 of the Laws of 1999, effective August 9, 1999.

M. In their brief, petitioners have addressed the issue of penalties only to the extent that they assert that it would be inequitable for petitioner Hazel Rubin to be liable for penalties imposed upon these deficiencies. As previously addressed in Conclusion of Law “L”, the Division of Tax Appeals is without equity jurisdiction except for small claims proceedings. Accordingly, penalties imposed upon the tax deficiencies are hereby sustained.

N. The petition of Richard and Hazel Rubin is denied and the Notice of Deficiency issued to petitioners on January 19, 1999, as modified by Finding of Fact “19”, is sustained.

DATED: Troy, New York
October 30, 2003

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE